

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1459

To be argued by
ARTHUR S. FRIEDMAN

B p/s

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

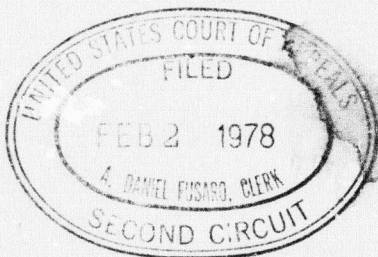
-against-

IRVING GOLDMAN,

Defendant-Appellant.

*From an Order of the United States District Court for the
Southern District of New York.*

**REPLY BRIEF FOR
DEFENDANT-APPELLANT**



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-1459

UNITED STATES OF AMERICA,

Appellee,

v.

IRVING GOLDMAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

Defendant-Appellant Irving Goldman submits this Reply Brief in opposition to the Brief filed by the United States, and in further support of his appeal.

Unable to counter appellant's position as a matter of law, the Government's Brief substitutes, as a defense to the appeal, a combination of epithet, misreading of the transcript, and selective interpretation of the trial record. We submit that a careful reading of both the record and the law demonstrates that the Government's positions are in error, and Judge Duffy's Order must be reversed.

I.

THE TESTIMONY OF JACK ZANDER

On January 10, 1978, the New York Times reported that the Government had "dropped" the prosecution of former representative Edward A. Garmatz of Maryland. United States Deputy Assistant Attorney General Russell T. Baker, Jr., in an "unusual dismissal statement" announced that since the main witness against Garmatz had "misrepresented" facts, the Government had decided to discontinue the prosecution. The reasoning was

straightforward. According to Baker:

"The Government will not sponsor a witness whose testimony is untruthful in any respect." (N.Y. Times, Jan. 10, 1978, pg. 1) (Emphasis supplied)

Despite that broad pronouncement, the Government, in this case, has chosen not only to sponsor such a witness -- Jack Zander, a confessed perjurer -- but, in addition, virtually to rest its case on his testimony.

While the details of Zander's testimony are not entirely germane to the issues of this appeal, the Government provides what is, at best, a selective summary of portions of Zander's testimony, apparently to show that "the Government had no reason to seek an abortion of the trial," and, indeed, to demonstrate that "[w]ith the redirect examination of Zander, the evidence of Goldman's guilt was enhanced, not diminished." (G. Br. 19)*.

* "G. Br." references are to the Government's Brief.

But we submit that a review of Zander's testimony reveals that the direct testimony of the Government's "star witness" was devastated on cross-examination; that the perjury indictment to which Zander later pleaded guilty was only one indication of the extent of that devastation; and that, accordingly, to the extent that the Government relies on Zander's testimony to negate defendant's argument that the Government was benefited by (and, indeed, may have sought) the mistrial, that reliance is undercut entirely by a proper and full analysis of Zander's testimony.

The following is only a sampling of the matters uncovered on cross-examination. Among other things -- all of which were conveniently (if not necessarily) ignored in the Government's summary of Zander's testimony -- it was revealed that:

- (1) After Zander informed his superiors at Sportservice of the alleged fraud which he perpetrated upon them -- of which they alleged-

ly were unaware -- and Zander was fired from his positions, Zander was later represented, at no fee, by the same attorneys who had represented and continued to represent Emprise* and Sportservice -- the parties who allegedly were the "victims" of the "fraud" perpetrated by Goldman and Zander (Tr. 205, 208, 210, 280).

(2) In order allegedly to "repay" the amounts "stolen" from Sportservice, Zander gave Sportservice a "demand note" for \$95,000. Zander has yet to make a single payment of interest or principal on that note (Tr. 227). Sic

* The Government's Brief is at pains to avoid invocation of "Emprise" -- the corporate parent of Sportservice. This is the same Emprise which was convicted in California under the anti-racketeering laws (United States v. Polizzi, 500 F.2d 856 [9th Cir. 1974]) and which was recently denied its request for a Presidential pardon (N.Y. Times, Sept. 29, 1977, pg. 1).

transit restitution.

(3) While Zander was allegedly forced to "resign" his Sportservice positions, his compensation under the terms of that resignation, is now virtually identical to the compensation he received as a full-time employee -- and it will remain so until he reaches retirement age, despite the fact that he now performs absolutely no services for Sportservice (Tr. 232, 247).

(4) The Federal Government uncovered substantial amounts of cash in a Zander-owned safe-deposit box, prompting a net worth audit of Zander, which resulted in a payment of additional income tax. (Tr. 424-6)

(5) While Zander was allegedly contemplating joining with Goldman

in his "scheme" to defraud Sportservice*, Zander formed a corporation -- Robrian -- to be used as the vehicle to "hide" his interest in the "scheme". Zander was so careful to "hide" this "scheme" from Sportservice that he caused Sportservice lawyers and accountants to form (and later dissolve) the corporation, and had other Sportservice officers as directors of Robrian (Tr. 317, 355-6). Judge Duffy, who watched this testimony unravel, greeted this revelation with the following comment:

"[Y]ou are claiming Sportservice was defrauded. Yet you have here, at least in the papers that you do have,

* But as the redirect examination disclosed, Zander had already allegedly been sharing the funds with Goldman (Tr. 714-16). How Robrian could have been formed in "contemplation" of Zander becoming partners with Goldman was, needless to say, never explained.

an indication that all of the people from Sportservice were up to their neck in this corporation and knew about it. * * * If they knew it how could they be defrauded?" (Tr. 329)

(6) The Altman transaction, wherein Zander received \$30,000 from an individual with whom Sportservice was then negotiating to buy an amusement park (Tr. 303-4), is mentioned in the Government's Brief as one of the areas of his perjury. (G. Br. 6). What is not mentioned is that Louis Jacobs, the owner and principal executive of Emprise and Sportservice, knew that Zander took that money (Tr. 311-2). Coupled with the later admission that the \$30,000 was paid to Zander in order to assure that Zander would use his influence with Jacobs to assure that the Altman deal would "close" (Tr. 710) -- rather than as a "gift", as Zander previously testified (Tr. 309) -- this

incident demonstrates that the owners of Sportservice were aware that Zander was "skimming" moneys from Sportservice contracts. And the knowledge and approval of Sportservice to this type of conduct by Zander importantly impacts the allegations that it was "defrauded" by the Jola arrangement.

(7) The cross-examination revealed a consistent and persistent pattern of Government interference with and defiance of its Brady and 18 U.S.C. §3500 obligations, prompting Judge Duffy to reserve decision on defendant's motions to dismiss the Indictment on this account. (Tr. 586, 592, 597).

In the face of the foregoing, the Government's straightfaced assertion that Zander's testimony was "deficient only in that it failed to reveal that the criminal venture started * * * several years before" (G. Br. 19) beggars belief. By every standard, the

mistrial acted to prejudice Goldman's case; the Government-provoked mistrial now enables the prosecution to remedy (or, at least, anticipate) the multiple inconsistencies and outright perjuries which pervaded Zander's testimony.

II.

THE DOUBLE JEOPARDY CLAUSE BARS
RETRIAL

The Government's Brief rests -- and founders -- on its statement of the ultimate question. For, time and again, the Government asserts that Judge Duffy "granted a defense motion for a mistrial". (G Br. 2, 2, 12). Phrased that way, the Government has answered at least one of the critical questions presented.*

The record demonstrates that the defense did not request a mistrial. To the contrary, the only motion that defense counsel made was a motion for dismissal. For, when the Government launched its

* A second question -- i.e., whether or not a defendant's constitutional rights should turn on who made the motion, where the mistrial motion is a product of the Government's conduct -- goes unanswered by the Government. Yet our initial brief demonstrated that even where the motion is made by the defendant, the result is no different. See Appellant's Brief, 14-16.

supposed rehabilitation project of its key witness Zander, and -- belatedly* -- gave defense counsel copies of certain Government memoranda documenting Zander's recantation, defense counsel objected and moved for dismissal (Tr. 732). The grounds for that motion were clear: the Government's key witness was confessing perjury, and the Government's technique of eliciting the recantation (and hoped-for rehabilitation) was plainly improper. We repeat the excerpt from the transcript which we reproduced in our initial brief:

"Mr. Friedman: If your Honor please, my experience doesn't encompass these things. I tell you that. But I can't believe what we are saying [seeing]. We are supposed to sit here while they have a duo, the witness who is a confessed perjurer. And it isn't just his testimony at this trial; he has perjury locked up that is two years old and more. And now we are going to have --

* The Government suggests (G. Br. 6, f.n.) that it supplied copies of Zander's statement as soon as possible. The suggestion is ridiculous; the Government sat on the memo during Zander's redirect on September 6. It was only proffered when Zander balked during that redirect examination.

The Court: That may be. I am not saying it is not.

Mr. Friedman: I am not suggesting that your Honor is suggesting otherwise. And now we are going to have a singles match between Miss Strauss and the witness while they try to rehabilitate this prostitute. And I think this is ridiculous.

The Court: You are referring only to the witness.

Mr. Friedman: I am, sir.

I think, Judge, that this case has to be thrown out. This man is a confessed perjurer. He has perjured himself all over his direct testimony. I can't even get all the ramifications of it. But it touches virtually every aspect into which he went on his direct examination. And now we are told he is going to be rehabilitated. And even now he hasn't flushed his system clean, because he can't tell the story that he told yesterday. I don't think we would suffer for this. This is the government's witness. This is the witness that they have seen so many times, they don't even know how to keep count of it." (Emphasis supplied) (Tr. 731-733)

The "one-on-one" series of questions which provoked the declaration of mistrial was simply the continuation of what defense counsel referred to as

the improper "sanitation process" (Tr. 738). And it was absolutely clear to everyone that, as a result of this continuation, the defendant was urging dismissal of the Indictment. The suggestion that the Government was "forc[ing]" a mistrial was simply an accurate reflection of what was transpiring -- a reflection which, indeed, Judge Duffy shared. But the defendant at no time moved for a mistrial.

The Government seizes, as well, upon defense counsel's acknowledgement of the possibility of a mistrial, and his failure to object to the mistrial, as further "evidence" of affirmative consent by the defendant to the mistrial. Neither argument will float. For one thing, the defense counsel's statements concerning the defendant's condition as affecting a mistrial was no more than a proper response to, and a dissent from, what the Court had already raised -- i.e., the prospect of mistrial. And defense counsel continued to reiterate that dismissal was the

appropriate remedy for the Government's conduct.

The mere silence of defendant in the face of the declaration of mistrial is simply not sufficient basis on which to hinge a finding that the defendant consented to the mistrial. As we noted in our initial Brief, United States v. Grasso, 552 F.2d 46 (2d Cir. 1977) specifically states that "affirmative consent may not be inferred from silence." See also Himmelfarb v. United States, 175 F.2d 924, 931, n.1 (9th Cir. 1949) (silence not consent).*

The Government relies on two cases, United States v. Gentile, 525 F.2d 252 (2d Cir. 1975), cert. denied, 425 U.S. 903 (1976), and United States v.

* Unbelievably, the Government contends that defense counsel's "thanking" the Court at the conclusion of the trial was an "expression of gratitude" (G. Br. 16), which evidenced that the defense was "clearly content" with the mistrial (G. Br. 11). Needless to say, defense counsel was only displaying a normal -- and proper -- courtesy to Judge Duffy.

Beckerman, 516 F.2d 905 (2d Cir. 1975), in support of its position. Both cases are readily distinguishable.

For one thing, both Gentile and Beckerman were decided prior to United States v. Grasso, *supra*, the leading (and most recent) case in this Circuit. Furthermore, Gentile repeatedly and explicitly emphasized that the mistrial was declared "in the sole interest of the defendant". 525 F.2d at 256, 257. and 258. See also Gori v. United States, 367 U.S. 364 (1961). In contrast, and as our initial Brief demonstrated (pp. 19-22), here the mistrial prejudiced the defendant, since it operates "as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." Downum v. United States, 372 U.S. 734 (1963).

Furthermore, in Beckerman, unlike here, the mistrial was declared after the trial was completed, and the jury announced, after extensive deliberation, that it was deadlocked. The District Court, again,

unlike here, made explicit findings as to the reasons for the mistrial.* 516 F.2d 909. By every standard, Beckerman is a far different case from the one at bar.

It may well be the statistically unusual case that results in a double jeopardy bar to reprosecution after a mistrial. But this case presents a classic application of the general rule, recently reiterated in United States v. Weaver, 565 F.2d 129 (8th Cir. 1977), which applies even where -- unlike here -- defendant makes the mistrial motion:

"Only in limited circumstances, where the judicial or prosecutorial error that prompts the defendant's motion is intended to provoke the motion or is otherwise motivated by bad faith or undertaken to harass or prejudice the defendant, does the double jeopardy

* Significantly, the Government fails to respond to defendant's argument that the District Court's failure to make findings as to the "manifest necessity" for a mistrial compels reversal of Judge Duffy's Order. See Appellant's Brief, pp. 13, 18-19.

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clause bar retrial." 565 F.2d at
133 (emphasis supplied).

Judge Duffy's Order must be reversed.

III.

THIS COURT HAS JURISDICTION
TO REVIEW DEFENDANT'S SPEEDY
TRIAL CLAIM

The Government's main opposition to appellant's "speedy trial" claim is centered on this Court's supposed lack of jurisdiction to review that claim. In light of United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976), cert. granted, 45 U.S.L.W. 3822 (June 21, 1977), the Government's argument is meritless. The procedural posture of MacDonald was substantially identical to that presented here, and, accordingly, review should be permitted here as in MacDonald.

Moreover, the Government misinterprets Abney v. United States, 431 U.S. 651 (1977). All that Abney holds is that a motion addressed to the sufficiency of the indictment cannot immediately be reviewed as "pendent" to a "double jeopardy" claim. Since appellant's "speedy trial" claim is sufficiently "collateral to, and separable from, the principal issue at the accused's

impending criminal trial, i.e., whether or not the accused is guilty of the offense charged", (52 L.Ed. 2d at 660), it is properly reviewable now. See generally Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).*

The Government's treatment of the merits of defendant's "speedy trial" claim is similarly wide of the mark. Indeed, short of the ipse dixit exclamation that the claim "is frivolous in the extreme" (G. Br. 23)**, the Government fails to present much in opposition. The short answer to all of the Government's arguments is that the policy of the Speedy Trial Act

* United States v. Cerilli, 558 F.2d 697 (3d Cir. 1977), also cited by the Government (G. Br. 21), did not involve a "speedy trial" claim. Indeed, the Government has not cited a single case which holds that a "speedy trial" claim is not immediately reviewable.

** Later, the epithet is recast: defendant's claim is described as "absurd on its face" and "ridiculous". G. Br. 24.

mandates that the defendant must go to trial within 180-days, not 180 plus 60. And, after a mistrial, that limit is shortened to 60 days -- not lengthened. In a mistrial situation, there is no need for any extension of speedy trial time; the case is usually (and in this case was announced to be) ready for immediate retrial. Indeed, here AUSA Strauss (perhaps recognizing speedy trial problems) asked for immediate retrial (Tr. 755). But there was no retrial within the statute-mandated time. Accordingly, the Indictment must be dismissed.

CONCLUSION

For all of the foregoing reasons, the Order of the District Court should be reversed, and the Indictment dismissed.

Respectfully submitted,

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COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

IRVING GOLDMAN

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Victor Ortega, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1715 Lacombe Avenue; Bronx, New York

That on the 2 day of February, 1978 at 1 St Andrews Plaza
New York, N.Y.

deponent served the annexed

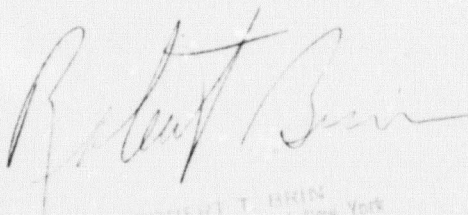
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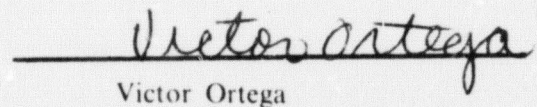
Robert Fiske
U.S Attorney-Southern District

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.

Sworn to before me, this 2nd
day of February 19 78



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418350
Qualified in New York County
Commission Expires March 30, 1979


Victor Ortega

